

Rulemaking Authority Involving Criminal Penalties

Report to the
Law Enforcement and Criminal Justice Interim Committee
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Rulemaking Authority Involving Criminal Penalties

Introduction

The Administrative Rules Review Committee has asked for interim study committees' recommendations regarding rulemaking authority that involves criminal penalties.

The rulemaking authority referred to the Law Enforcement and Criminal Justice Committee was Subsection 76-8-311.3(5)(b)(See attached law and rules). Rules relating to this section were made by the Utah State Hospital and the Division of Youth Corrections. The criminal penalties relating to the rules are contained in statute. The rules define respective "secure areas" and provide other direction and procedure.

The Law Enforcement and Criminal Justice Committee on July 18, 2007 discussed the issue and recommended that the Legislature not grant rulemaking authority to establish rules that include criminal penalties. The committee also directed staff to provide an overview of the rule.

Potential Inconsistencies

1. The Utah State Hospital's rule (R525-6-1) defines the hospital's "secure area" in a way that conflicts with the statutory definition of a secure area.

R525-6-1 states:

"the entire campus and all facilities of the Utah State Hospital, including its buildings and grounds are designated as secure areas by this rule."

The statutory definition (76-8-311.1) of "secure area" governing the rule specifies that:
"A secure area may not include any area normally accessible to the public."

The grounds of the State Hospital are usually open and accessible to the public.

2. The Utah State Hospital's rule (R525-6-1), in specifying all buildings and grounds as a secure area, does not meet the requirement of Subsection 76-8-311.1(4) which requires the facility to provide a secure weapons storage area that is available prior to entering the secure area. The Utah State Hospital provides this storage inside the administration building, near the back of the campus.

Possible Solutions

1. The statute could be modified to eliminate the need for rulemaking authority.

The director or administrator of each correctional, law enforcement, or mental health

facility could establish the secure areas within the facility by:

- a. prominently displaying notice of the prohibited items and the penalties; and
- b. providing a secure weapons storage area available prior to entering a secure area.

Section 76-8-311.1 currently requires:

Subsection (3): "At least one notice prominently displayed at each entrance to an area in which a firearm, ammunition, dangerous weapon, or explosive is restricted."

Subsection (4)(a): "Provisions shall be made to provide a secure weapons storage area so that persons entering the secure area may **store their weapons prior to entering the secure area.**"

Subsection (4)(b): "The entity operating the facility shall be responsible for weapons while they are stored in the storage area."

2. There are small inconsistencies in the language between the penalty and the statutes which can be corrected.

The prepositions used in the penalties in Subsection 76-8-311.1(6), which prohibit transporting "into a secure area of a facility," treat correctional, law enforcement, and mental health facilities the same.

The penalties in Section 76-8-311.3 differentiate correctional facilities and mental health facilities by specifying the location as "at" or "to or upon" a correctional facility and "into a secure area" or "within a secure area" of a mental health facility.

Rulemaking Authority

Subsection 76-8-311.1(2)(a):

A person in charge of a correctional, law enforcement, or mental health facility may establish secure areas within the facility and may prohibit or control by rule any firearm, ammunition, dangerous weapon, or explosive.

Subsection 76-8-311.3(2):

Notwithstanding Section 76-10-500, a correctional or mental health facility may provide by rule that no firearm, ammunition, dangerous weapon, implement of escape, explosive, controlled substance, spirituous or fermented liquor, medicine, or poison in any quantity may be:

- (a) transported to or upon a correctional or mental health facility;
- (b) sold or given away at any correctional or mental health facility;
- (c) given to or used by any offender at a correctional or mental health facility; or

(d) knowingly or intentionally possessed at a correctional or mental health facility.

Subsection 76-8-311.3(7):

The department shall make rules under Title 63, Chapter 46a, Utah Administrative Rulemaking Act, to establish guidelines for providing written notice to visitors that providing any tobacco product to offenders is a class A misdemeanor.

Definitions

The definitions of "secure area," "correctional facility," and "mental health facility" apply to both Section 76-8-311.1 and Section 76-8-311.3.

Secure Area

Subsection 76-8-311.1(e)

- (i) "Secure area" means any area into which certain persons are restricted from transporting any firearm, ammunition, dangerous weapon, or explosive.
- (ii) **A "secure area" may not include any area normally accessible to the public.**

Correctional Facility

Subsection 76-8-311.3(1)(c) "Correctional facility" means:

- (i) any facility operated by or contracting with the Department of Corrections to house offenders in either a secure or nonsecure setting;
- (ii) any facility operated by a municipality or county to house or detain criminal offenders;
- (iii) any juvenile detention facility; and
- (iv) *any building or grounds appurtenant to the facility* or lands granted to the state, municipality, or county for use as a correctional facility.

Mental Health Facility

Subsection 62A-15-602 (9)

- (9) "Mental health facility" means the Utah State Hospital or other facility that provides mental health services under contract with the division, a local mental health authority, or organization that contracts with a local mental health authority.

Note: The Division of Substance Abuse and Mental Health contracts with counties, who in turn contract with local mental health authorities e.g., Valley Mental Health for Salt Lake County and Davis Behavioral Health for Davis County.

These and other mental health authorities have some facilities they consider secure such as the CRU (Critical Rehabilitation Unit) and other facilities used for substance abuse services.

Compliance With Rules for Concealed Weapons Permit Licensees

Section 76-10-523.5.

Any person, including a person licensed to carry a concealed firearm under Title 53, Chapter 5, Part 7, Concealed Weapons, shall comply with **any rule** established for secure facilities pursuant to Sections 53B-3-103, 76-8-311.1, 76-8-311.3, and 78-7-6 and shall be subject to any penalty provided in those sections.

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Penalties in Sections 76-8-311.1 & 311.3, UCA

Forbidden object/material	Actor	Offense	Location	Penalty	Reference
Firearm, ammunition, or dangerous weapon	any person	transport	into a secure area of a facility	third degree felony	76-8-311.1(6)
Firearm, ammunition, or dangerous weapon, or implement of escape	"	transports with intent to provide or sell	to or upon a correctional facility (cf) or into a secure area of a mental health facility (mhf)	second degree felony	76-8-311.3(4)(a)
"	"	provides or sells to an offender or detainee	at a correctional facility or secure area of a mental health facility	"	76-8-311.3(4)(b)
"	an offender	possesses	"	"	76-8-311.3(4)(c)
"	any person	possesses knowingly and w/o permission	"	third degree felony	76-8-311.3(4)(d)
spirituous or fermented liquor, medicine, or poison	a person	transports knowingly and w/o permission	to or upon a correctional facility or into a secure area of a mental health facility	"	76-8-311.3(5)(a)
"	"	provides or sells knowingly violating cf or mhf policy or rule	at a correctional facility or within a secure area of a mental health facility	"	76-8-311.3(5)(b)
"	inmate	possesses in violation of policy or rule	at a correctional facility. or in a secure area of a mental health facility	"	76-8-311.3(5)(c)

Penalties in Sections 76-8-311.1 & 311.3, UCA (Continued)

Forbidden object/material	Actor	Offense	Location	Penalty	Reference
Tobacco	a person	transport, deliver, distribute to an offender or on the grounds with intent to provide or sell	on the grounds of any correctional facility	class A misdemeanor	76-8-311.3(5)(d)(i)
"	"	solicits, requests, commands, coerces, encourages, causes, facilitates, or intentionally aids another to transport to an offender or on any cf	on any correctional facility or grounds	"	76-8-311.3(5)(d)(ii) and (iii)
"	"	w/o permission possesses or fails to declare	at a correctional facility or in a secure area of a mental health facility	"	76-8-311.3(5)(e)
Any other contraband	"	w/o permission knowingly engages in any activity that would facilitate the possession of any contraband by an offender	in a correctional facility	class B misdemeanor	76-8-311.3(5)(f)
any explosive, chemical, or incendiary device	"	transport, possess, distribute, or sell	in a secure area established pursuant to 76-8-311.1	first degree felony	76-10-306(4)

abbreviations:

cf= correctional facility

mhf = mental health facility

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76-8-311.1. Secure areas -- Items prohibited -- Penalty.

- (1) In addition to the definitions in Section 76-10-501, as used in this section:
 - (a) "Correctional facility" has the same meaning as defined in Section 76-8-311.3.
 - (b) "Explosive" has the same meaning as defined for "explosive, chemical, or incendiary device" defined in Section 76-10-306.
 - (c) "Law enforcement facility" means a facility which is owned, leased, or operated by a law enforcement agency.
 - (d) "Mental health facility" has the same meaning as defined in Section 62A-15-602.
 - (e) (i) "Secure area" means any area into which certain persons are restricted from transporting any firearm, ammunition, dangerous weapon, or explosive.
 - (ii) A "secure area" may not include any area normally accessible to the public.
- (2) (a) A person in charge of a correctional, law enforcement, or mental health facility may establish secure areas within the facility and may prohibit or control by rule any firearm, ammunition, dangerous weapon, or explosive.
 - (b) Subsections (2)(a), (3), (4), (5), and (6) apply to higher education secure area hearing rooms referred to in Subsections 53B-3-103(2)(a)(ii) and (b).
 - (3) At least one notice shall be prominently displayed at each entrance to an area in which a firearm, ammunition, dangerous weapon, or explosive is restricted.
 - (4) (a) Provisions shall be made to provide a secure weapons storage area so that persons entering the secure area may store their weapons prior to entering the secure area.
 - (b) The entity operating the facility shall be responsible for weapons while they are stored in the storage area.
 - (5) It is a defense to any prosecution under this section that the accused, in committing the act made criminal by this section, acted in conformity with the facility's rule or policy established pursuant to this section.
 - (6) (a) Any person who knowingly or intentionally transports into a secure area of a facility any firearm, ammunition, or dangerous weapon is guilty of a third degree felony.
 - (b) Any person violates Section 76-10-306 who knowingly or intentionally transports, possesses, distributes, or sells any explosive in a secure area of a facility.

Amended by Chapter 8, 2002 Special Session 5

76-8-311.3. Items prohibited in correctional and mental health facilities -- Penalties.

- (1) As used in this section:
 - (a) "Contraband" means any item not specifically prohibited for possession by offenders under this section or Title 58, Chapter 37, Utah Controlled Substances Act.

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(b) "Controlled substance" means any substance defined as a controlled substance under Title 58, Chapter 37, Utah Controlled Substances Act.

(c) "Correctional facility" means:

(i) any facility operated by or contracting with the Department of Corrections to house offenders in either a secure or nonsecure setting;

(ii) any facility operated by a municipality or a county to house or detain criminal offenders;

(iii) any juvenile detention facility; and

(iv) any building or grounds appurtenant to the facility or lands granted to the state, municipality, or county for use as a correctional facility.

(d) "Medicine" means any prescription drug as defined in Title 58, Chapter 17b, Pharmacy Practice Act, but does not include any controlled substances as defined in Title 58, Chapter 37, Utah Controlled Substances Act.

(e) "Mental health facility" has the same meaning as defined in Section 62A-15-602.

(f) "Offender" means a person in custody at a correctional facility.

(g) "Secure area" has the same meaning as provided in Section 76-8-311.1.

(2) Notwithstanding Section 76-10-500, a correctional or mental health facility may provide by rule that no firearm, ammunition, dangerous weapon, implement of escape, explosive, controlled substance, spirituous or fermented liquor, medicine, or poison in any quantity may be:

(a) transported to or upon a correctional or mental health facility;

(b) sold or given away at any correctional or mental health facility;

(c) given to or used by any offender at a correctional or mental health facility; or

(d) knowingly or intentionally possessed at a correctional or mental health facility.

(3) It is a defense to any prosecution under this section if the accused in committing the act made criminal by this section:

(a) with respect to a correctional facility operated by the Department of Corrections, acted in conformity with departmental rule or policy;

(b) with respect to a correctional facility operated by a municipality, acted in conformity with the policy of the municipality;

(c) with respect to a correctional facility operated by a county, acted in conformity with the policy of the county; or

(d) with respect to a mental health facility, acted in conformity with the policy of the mental health facility.

(4) (a) Any person who transports to or upon a correctional facility, or into a secure area of a mental health facility, any firearm, ammunition, dangerous weapon, or implement of escape with intent to provide or sell it to any offender, is guilty of a second degree felony.

(b) Any person who provides or sells to any offender at a correctional facility, or any detainee at a secure area of a mental health facility, any firearm, ammunition, dangerous weapon, or implement of escape is guilty of a second degree felony.

(c) Any offender who possesses at a correctional facility, or any detainee who possesses at a secure area of a mental health facility, any firearm, ammunition, dangerous weapon, or implement of escape is guilty of a second degree felony.

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(d) Any person who, without the permission of the authority operating the correctional facility or the secure area of a mental health facility, knowingly possesses at a correctional facility or a secure area of a mental health facility any firearm, ammunition, dangerous weapon, or implement of escape is guilty of a third degree felony.

(e) Any person violates Section 76-10-306 who knowingly or intentionally transports, possesses, distributes, or sells any explosive in a correctional facility or mental health facility.

(5) (a) A person is guilty of a third degree felony who, without the permission of the authority operating the correctional facility or secure area of a mental health facility, knowingly transports to or upon a correctional facility or into a secure area of a mental health facility any:

- (i) spirituous or fermented liquor;
- (ii) medicine, whether or not lawfully prescribed for the offender; or
- (iii) poison in any quantity.

(b) A person is guilty of a third degree felony who knowingly violates correctional or mental health facility policy or rule by providing or selling to any offender at a correctional facility or detainee within a secure area of a mental health facility any:

- (i) spirituous or fermented liquor;
- (ii) medicine, whether or not lawfully prescribed for the offender; or
- (iii) poison in any quantity.

(c) An inmate is guilty of a third degree felony who, in violation of correctional or mental health facility policy or rule, possesses at a correctional facility or in a secure area of a mental health facility any:

- (i) spirituous or fermented liquor;
- (ii) medicine, other than medicine provided by the facility's health care providers in compliance with facility policy; or
- (iii) poison in any quantity.

(d) A person is guilty of a class A misdemeanor who, with the intent to directly or indirectly provide or sell any tobacco product to an offender, directly or indirectly:

- (i) transports, delivers, or distributes any tobacco product to an offender or on the grounds of any correctional facility;
- (ii) solicits, requests, commands, coerces, encourages, or intentionally aids another person to transport any tobacco product to an offender or on any correctional facility, if the person is acting with the mental state required for the commission of an offense; or
- (iii) facilitates, arranges, or causes the transport of any tobacco product in violation of this section to an offender or on the grounds of any correctional facility.

(e) A person is guilty of a class A misdemeanor who, without the permission of the authority operating the correctional or mental health facility, fails to declare or knowingly possesses at a correctional facility or in a secure area of a mental health facility any:

- (i) spirituous or fermented liquor;
- (ii) medicine; or
- (iii) poison in any quantity.

(f) A person is guilty of a class B misdemeanor who, without the permission of the authority operating the correctional facility, knowingly engages in any activity that would

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facilitate the possession of any contraband by an offender in a correctional facility. The provisions of Subsection (5)(d) regarding any tobacco product take precedence over this Subsection (5)(f).

(g) Exemptions may be granted for worship for Native American inmates pursuant to Section 64-13-40.

(6) The possession, distribution, or use of a controlled substance at a correctional facility or in a secure area of a mental health facility shall be prosecuted in accordance with Title 58, Chapter 37, Utah Controlled Substances Act.

(7) The department shall make rules under Title 63, Chapter 46a, Utah Administrative Rulemaking Act, to establish guidelines for providing written notice to visitors that providing any tobacco product to offenders is a class A misdemeanor.

Amended by Chapter 36, 2004 General Session

Amended by Chapter 280, 2004 General Session

R525-6. Prohibited Items and Devices.

R525-6-1. Prohibited Items and Devices.

R525-6-1. Prohibited Items and Devices.

Pursuant to the requirements of Sections 62A-15-603(3) and 76-8-311.1(2)(a), the entire campus and all facilities of the Utah State Hospital, including its buildings and grounds are designated as secure areas by this rule. Accordingly all weapons, contraband, controlled substances, ammunition, items that can implement escape, explosives, spirituous or fermented liquors, firearms, or any devices that are normally considered to be weapons are prohibited from entry into the campus of the Utah State Hospital. Persons entering the Utah State Hospital campus must secure all weapons in their locked vehicles, out of sight, or they may secure their weapon in a secure storage locker. Secure storage lockers for public use are identified and accessed through directions provided at the entrance of the Utah State Hospital campus. A person is not in violation of this rule during the time required to directly enter the campus and immediately place a weapon in a secure storage locker or immediately secure it out of sight in a locked vehicle.

References: 62A-15-603(3), 76-8-311.1(2)(a), 76-8-311.3(2).

History: 20891, NEW, see CPR; 20891, CPR, 08/15/98; 26516, 5YR, 07/30/2003; 27999, NSC, 08/01/2005.

R547-14. Possession of Prohibited Items in Juvenile Detention Facilities.

R547-14-1. Definitions.

R547-14-2. Weapon Restrictions.

R547-14-1. Definitions.

(1) "Juvenile detention facility" means a specific location that is operated directly or by contract by the Division of Juvenile Justice Services for delivery of services to youth, and in which:

- (a) youth in the custody of the Division of Juvenile Justice Services are present; and
- (b) public access is controlled.

(2) "Secure area" has the same meaning as provided in Section 76-8-311.1.

R547-14-2. Weapon Restrictions.

(1) No person, including a person licensed to carry a concealed firearm under Title 53, Chapter 5, Part 7, Concealed Weapons, shall be permitted to enter a secure area of any juvenile detention facility with any items prohibited by UCA 76-8-311.1 or 76-8-311.3.

(2) The director or administrator of each juvenile detention facility shall:

- (a) establish secure areas within the facility;
- (b) prominently display the following notice at each entrance of a secure area:

"This is a secure area as defined in UCA 76-8-311.1. No person, including a person licensed to carry a concealed firearm under Title 53, Chapter 5, Part 7, Concealed Weapons, shall be permitted to enter if that person has possession of any firearm, ammunition, dangerous weapon, explosive, or controlled substance. Violation of this prohibition is a third degree felony and violators are subject to prosecution. Firearms may be placed in secure weapons storage as provided by the facility."; and

- (c) provide secure weapon storage at each entrance to a secure area facility.

References: 76-8-311.1, 76-8-311.3, 76-10-523.5, 53-5-710.